Concept of IPRs International Protection and Enforcement in EU Trade Agreements

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Introduction

Intellectual Property Rights legislation and the ability of a country to enforce these rights are factors that influence decisions of multinational companies on location of their investment including research and development activities and decisions of producers on the mode of entering the target market. The quality of national IPRs laws and practices determines whether the country attracts innovative foreign direct investment and promotes domestic development of high technology industry.

International protection and enforcement of IPRs is a complementary element to the matrix of national systems. As global companies and other successful producers operate internationally, they are pursuing a stable, reliable and transparent business environment regulated by enforceable legislation, including IPRs laws, at all markets. They lobby in this sense their governments and as a result, IPRs became in last fifteen years a subject to some international trade agreements or to numerous bilateral agreements.

While the international agreements on various categories of IPRs protection date from the beginning of the 20th century, the establishment of the World Trade Organization (WTO) confirmed the need for an effective enforcement of IPRs, as a prerequisite for a fair and free trade. Since then, IPRs as an important aspect are incorporated also into the bilateral preferential trade agreements. Goal of these provisions is to provide a legal environment at the market of trade preferential partners, similar to the one that companies find in the area of IPRs protection and enforcement at their domestic markets. It is obvious that such an environment is pursing namely by developed countries with a high level of IPRs legislation, leaded by the EU and USA.

The most important business related issue is an effective enforcement of IPRs – without it, business is threatened at domestic and foreign markets by important trade losses related to loss of exclusivity, loss of the market and loss of the credibility in consumers´ eyes. Even if IPRs are a field, in which very many countries do not recognize the trade related aspects and do not tend to implement them into their trade legislation and into commitments on preferential market access, we can suppose that they will become very soon an obvious part of any trade arrangement. It is the reason why this paper studies the concept of IPRs in trade agreements. As a case is used the approach of the European Union, because IPRs became the 1st December 2009 – after the Lisbon Treaty has been signed by the last EU Member State - an exclusive competence within EU Common Commercial Policy. It had impacts on the task of the European Commission (EC) within the IPRs field that become more easily pursuable.

Before the Lisbon Treaty, IPRs were one of the so called mixed competences, what meant that agreements on trade related aspects of intellectual property rights came in force only after all the EU Member States (national Parliaments) ratified it. The process of mixed agreements gave the Member States (MS) an opportunity to influence such agreements more significantly - in the stage of negotiations and during the national procedure of ratification. Since the 1st December 2009, the last possibility to influence agreements with trade related aspects is open in the Council and European Parliament procedures. National legislators do not have even any chance to intervene into the negotiations and approval of such an agreement. Changes in the Common Commercial Policy have been already projected into the negotiations of the European Commission that has now much more space for its initiatives in pursuing IPRs into multilateral, plurilateral and bilateral agreements. The mentioned underlined my attempt to analyze the current activities of the EU-EC at various forums and to identify intentions behind them.

Multilateral Trade Agreement

The most important multilateral trade agreement on protection and enforcement of IPRs, to which the EU and its 27 Member States is a member, is the Trade Related Intellectual Property Rights Agreement, TRIPS, that is in force together with all other WTO agreements since 1995. TRIPS Agreement provided for different periods for its implementation into national legislation of the WTO developed and developing members, but nowadays, all the WTO members with an exception of Least Developed Countries (LDCs) should have a national legislation that grants a minimum standard of protection and enforcement of all categories of IPRs: copyright and neighboring rights, patents, industrial designs, trademarks, geographical indications, lay-out design of integrated circuits, undisclosed information and know-how.

The TRIPS agreement is a basis for a discussion of several topics that could lead in the future to an amendment of some provisions of the agreement. First of all, there is claim of some developing countries, namely Brazil, to implement an obligation for providing - in patent applications - origin of genetic resources and traditional knowledge in connection to the innovation. This information should be followed by benefit sharing, what will ensure a certain financial income namely for developing countries. EU is within this topic in an antagonistic position: some MS, namely those with a strong research oriented industry and high number of patent applications, do not agree with the mentioned request and do not want to accept it until the processes on equitable benefit sharing are designed. For other MS, the publication of the origin of genetic resources is not a problem, but they do not consider it neutrally – on the contrary, they support it, as they have an interest in another issue bound with it – in the discussion of higher level of protection for geographical indications GIs). In the discussions on GIs, it is possible to obtain – on a reciprocal basis – support from the countries asking the publication of genetic resources origin. With the view to the internal situation, EU proposes a compromise: „legal effects of the publication of the origin of genetic resources outside of the patent law". The EU support to the request of Brazilian initiative became apparently one of the positive stimuli for the re-start of negotiations on preferential trade agreement EU-Mercosur.

Origin of genetic resources requirement is bound with GIs in two aspects: the mandate in the current round of negotiations on trade liberalization, Doha Development Agenda, provides for negotiations on establishment of a system for notification and registration for GIs on wines and spirits. EU promotes establishment of a register with legal effects that should be reflected in the amendment of the TRIPS agreement. GIs registration will enable GIs owners to enforce in all WTO countries protection against unfair use of their GIs like using it as a trademark. The second aspect is the EU interest in enhancing the level of GIs protection for other products, as they – according to the TRIPS agreement – enjoy lower protection against misuse, based only on the „consumers misleading" concept. If EU succeeds in extension of the high level of GIs protection of products other than wines and spirits, these GIs would be included into the eventually established GIs registration system, what would have important trade impacts and it would allow EU to eliminate GIs issue from bilateral negotiations on preferential trade agreements.

With the aim to put over EU interests at multilateral level and as a consequence, to facilitate bilateral negotiations, EU came with an initiative to open at the WTO a discussion on enforcement of IPRs. IPRs enforcement and boarder measures as a barrier for importation of goods infringing IPRs, is a problem of many states, namely in effectiveness and speed of enforcement measures. TRIPS agreement – being more than 16 years old - does not reflect the current level of information technology and internet that are used for the IPRs infringement very often.

ACTA Agreement

The Anti-Counterfeiting Trade Agreement (ACTA) is a plurilateral agreement that text has been negotiated among Australia, Canada, EU, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and USA, and the negotiation finished in 2010. The agreement is composed from following sections: Civil Enforcement, Border Measures, Criminal Enforcement, Enforcement Measures in the Digital Environment, International Cooperation and Enforcement Practices. It is not yet in force, waiting for ratification in signatory countries.

The goal of the Agreement is to set up a basis for an effective combat against proliferation of IPRs infringement, not only in individual countries, but also in extension on exportation, re-export and transfer of goods through the territories of the signatories. Need for such an agreements is a consequence of very many problems that business faces in relation with IPRs protection and

enforcement at third territories and of the presumption that IPRs protection and enforcement are a necessary conditions for trade and sustainable global economic development. EU declared this agreement being an important part of the European Union's 'Lisbon Agenda' for building a European knowledge economy.

The ACTA attracted attention of all the civil society, namely because it had been negotiated in a secret mode. On the pressure of non-governmental associations, business and European Parliament, the text had been published by the European Commission in the last stage of negotiations. The agreement should have been stronger IPRs enforcement provision that it is in the end. It should have contained also punitive measures against potential IPRs infringers (disconnections from internet) without adequate court oversight or due process. Other fears concerned measures also against copying for own use. A threat for producers and exporters of generic pharmaceuticals was a possibility to seize medicines at the boarder of any transit country, in which the pharmaceutical is under patent protection, even without any patent infringement in the country of production or importation and consumption.

ACTA is introduced now as a catalogue of best practices that help members to fight effectively with IPRs copying and infringement. It is a new international standard: its basis is the TRIPS agreement, but enforcement aspects are strengthened. Besides civil and criminal enforcement, ACTA contains also a detailed and effective mechanism for international cooperation in the IPRs fields.

The agreement does not establish new IPRs, it does not narrow or extend the existing ones, it does not authorize customs officers to examine travel luggage or personal electronic devices and it should not influence transit of legally produced generic pharmaceuticals, as the border measures do not comprise patents. New standards are, however, defined in the internet related areas and a minimum level of their harmonization is established.

From the EU legislation perspective, ACTA formulates modes that could be used by IPRs holders while seeking judicial enforcement at borders or within internet; the EU legislation will not be substantially amended.

Negotiations on ACTA agreement, from the EU part, has been facilitated, if not enabled, by the changes in the EU Common Commercial Policy, namely by establishing exclusive EU competences over trade related aspects of IPRs. It is highly probable that such a controversial agreement as ACTA, which concrete consequences are difficult to be estimated, would not have been ever approved by individual EU Member States.

Individual EU Member States were not allowed to participate actively in ACTA negotiations – they were informed about the text of the agreement alongside with the European Parliament at the almost last stage of negotiations. They might be, however, concerned by implementation of the ACTA agreement - it will be submitted to the Common Commercial Policy rules, because it is a *trade agreement*. It means that all parts including the criminal law and border measures parts will be implemented into the EU *acquis* through EU Regulations and no national legislation will be voted by national Parliaments.

EU-South Korea FTA

Free Trade Agreement EU- South Korea that has been approved by the European Parliament as the first trade agreement under the Lisbon Treaty, enters in force the 1 July 2011. It contains relatively strong IPRs provisions.

The most important provision is the extension of the patent protection period for pharmaceuticals, and protection of so called undisclosed information, which reflects EU interests. The mentioned protection for pharmaceuticals is called Supplementary Protection Certificate, which is an extension of 5 or 5 and half years above 20 years of general patent protection. It is a part of the EU legislation and it compensates owners of pharmaceuticals patents for the long time needed to obtain marketing approval for their product. It extends the patent monopoly and enhances a profitability of means invested into the research. In addition, also in accordance with the EU legislation, protection of 10 years is introduced for undisclosed information (data exclusivity, usually results of clinical trials) that cannot be used by generic pharmaceutical industry.

As EU and South Korea are both signatories of the ACTA agreement, it has not been apparently difficult to introduce into the bilateral trade agreement the same provisions as are to found in ACTA – namely criminal prosecution for IPRs infringement at internet. The FTA is in some parts

much broader: it contains, except of reciprocal copyright and neighboring rights and trademark protection, also protection of design, services trademarks, lay-out design of integrated circuits, geographical indications, and protection of plant varieties. The Agreement deals also with such delinquency as crime of "aiding and abetting" copyright and trademark infringement on a commercial scale, covers broadcasters right to prohibit further dissemination to the public for free and includes searches and seizures of goods at boarders upon request of right holders.

Trade Agreements with Latin America Countries

In 2010, EU finished negotiations on the Association Agreement with a group of Central America countries that includes Costa Rica, Guatemala, Salvador, Honduras, Panama and Nicaragua. Free Trade Agreement is one of pillars of the Association Agreement and it includes also a part dedicated to the IPR protection and enforcement. EU succeeded to introduce some important commitments that not only enhance the level of IPRs protection above the minimum standard of the TRIPS Agreement, but also provisions of an effective enforcement of these rights, as criminal prosecution and seizure of goods infringing intellectual property rights. Counterfeited goods can be seized at the border as well as in any phase of its distribution. These provisions should be implemented into the national legislation of all Central American countries mentioned what will establish the same conditions for IPRs protection and enforcement in the business environment that private subjects find within the EU, namely - since 2003 - in the area of border measures. Breaking these commitments could have trade consequences, as compensations in enhancing tariffs for importation of goods from the country that does not comply with these commitments to the EU market.

The mentioned provisions should concern counterfeited goods, as branded clothing, computers, mobile phones or pirated CD and movies. Some analysts[1] argue, however, that these measures could be used also as a basis for seizure and destruction of a good that infringes patent rights. In this case, also generic medicines aimed to help the poor population of Central America could be confiscated, even if such pharmaceuticals are produced and consumed in countries where the patent protection of such medicines does not exist[2]. It could harm very significantly access to pharmaceuticals needed for public health protection that would not be in conformity with the EU commitments at the WTO.

The most important trade negotiations in the region are open with the group of Mercosur countries. Negotiations started already in 1995, but they were interrupted in 2004 due to the lack of progress in the multilateral liberalization negotiations at the WTO. Mercosur countries, namely Brazil, did not want to commit itself to any market liberalization until the results of the WTO talks are clear. In 2010, negotiations have been renewed and since then, several rounds of negotiations had been held.

The interruption had been caused also by different views of negotiating parties on the extent of the future agreement. EU pursued a broad agreement, covering not only trade in goods and services but also other areas including investment and protection and enforcement of intellectual property rights. Countries of Mercosur, whose economic integration did not reach the dept and level as the EU´s one and in which IPRs protection and enforcement is – as in majority of developing countries - less developed, preferred a "classical" trade agreement (goods, at certain limit also services). Moreover, it is evident that Mercosur was concerned by the lack of EU exclusive competences for negotiations on investment and intellectual property rights, because EU mixed competences in these fields could have caused difficulties in the ratification process in all EU-27 member states if a frangible compromise was reached.

Negotiations on the free trade agreement have been renewed in May 2010. As the reason for renewing them cannot be found in any progress of the WTO multilateral negotiations, it is possible to assign it to other factors. Among them, the fundamental change in Common Commercial Policy under the Lisbon Treaty embeds new competences for the area of trade related intellectual property rights. Competences defined as exclusive ones are a more secure basis for "passing" any future trade

[1] Cronin, D. Risk of wrongful medicines seizures seen in EU-Central America Trade Deal, Intellectual Property Watch, 6. April 2010

[2] Such a case happened for example in 2008 and 2009, when The transit of Indian pharmaceuticals on HIV had been blocked in the Netherlands although they were in transit to \Nigeria and to Brazil. It happened due to a complaint of research oriented pharmaceutical industry on infringement of their patent rights in Netherlands. This case is now a subject for a dispute settlement at the WTO.

agreement with IPRs and investment elements through the whole approval and ratification process in European Parliament and EU Council. Such a high probability is very important as the result of negotiations is a compromise within which different areas are balanced. The negotiations have been renewed on a basis of a new goal formulation of the future Association Agreement. It should comprise mutual liberalization of trade with goods and services, with respect to sensitive products and sectors of economy, non-tariff barriers to trade, namely sanitary and phytosanitary measures and rules of origin, investment rules, governmental procurement principles, fair competition and dispute settlement system. The key point of negotiations remained intellectual property rights protection; the IPR enforcement is not, however, explicitly stated. Underlined are only geographical indications as one of the main EU interest.

Conclusion

Intellectual Property Rights, namely their trade aspects, are stated as an important part of all EU strategies. In the framework of the Lisbon agenda these rights has been identified as one of the key element contributing to the EU competitiveness, in the strategy Global Europe is the improvement of IPRs enforcement stated as one of key goals, and aims of the new strategy Europe 2020 are based on the IPRs protection and enforcement as well.

International cooperation in the IPRs protection and enforcement at the multilateral, plurilateral or bilateral level is an important tool to meet strategic EU goals. From the pragmatical point of view, the EU interests will be more easily pursued if IPRs are included into the exclusive EU competences. It is not yet the actual situation, as under the Lisbon Treaty, the EU exclusive competences are limited by trade aspects of IPRs. It is, however, a sufficient basis for negotiations on trade agreements that include IPRs. Following new procedures in trade agreements implementation into the EU legislation will lead to a common EU laws namely on the IPRs enforcement that will be identical in all Member States (EU Regulations).

Until now, only one Free Trade Agreement has been signed and approved by the European Parliament according to the Lisbon Treaty. The FTA EU - South Korea, enforceable from the 1 July 2011, consists also of chapters with a very strong IPRs protection and enforcement, based on features of the ACTA agreement that both partners negotiated. As the EU is negotiating other FTAs with India, Mercosur, Malaysia, it is highly probable that the EU will pursue the pattern implemented into FTA with Korea as well. Question arises, however, it the EU partners will accept it. On the other side, it could be accepted by Canada, as it is an ACTA signatory and should not have any constrains against IPRs provisions in the future FTA with the EU. EU´s approach on IPRs in the trade negotiations can become a precedent for the whole field of IPRs, not only for trade aspects. It will probably affect negotiations on international agreements on IPRs protection and enforcement in the WIPO system (World Intellectual Property Organization).

It is necessary to add, however, that the strengthening of monopoly of IPRs owners is not in line with some EU international commitments, namely within development programs. An important part of these programs is an access to medicines that is, however, undermined by a strong IPRs protection. IPRs protection and disconnection of internet users on intellectual property rights grounds could be also a barrier to access to information that could have negative impacts on pursuing a broad education in both developed and developing world. It is necessary that the IPRs issue is considered also from other then trade opinions, for example Human Rights and freedom of expression perspectives, and such a delicate balance should be reflected also in the EU trade agreements.

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